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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 99

THE CINCINNATI GAS & ELECTRIC COMPANY, and THE CITY OF CINCINNATI, *Petitioners,*

v.

FEDERAL POWER COMMISSION, THE CITY OF HAMILTON, OHIO, and TEXAS GAS TRANSMISSION CORPORATION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT THE CITY OF HAMILTON, OHIO, IN OPPOSITION

J. DAVID MANN, JR.
ROBERT A. PEAVY
1120 Connecticut Ave., N.W.
Washington, D. C. 20036
Attorneys for
The City of Hamilton, Ohio

Of Counsel:
MORGAN, LEWIS & BOCKIUS
Philadelphia-Washington

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THE CINCINNATI GAS & ELECTRIC COMPANY, and THE CITY OF CINCINNATI, *Petitioners,*

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BRIEF OF RESPONDENT THE CITY OF HAMILTON, OHIO, IN OPPOSITION

QUESTION PRESENTED

Was the court below correct in concluding that the Federal Power Commission properly discharged its statutory obligation to protect the overall public interest when it authorized a natural gas distributor, whose non-regulated contract with its middleman distributor-supplier had expired, to obtain a cheaper, fully regulated gas supply directly from an interstate pipe-

line, in circumstances where the substantial and lasting benefits to the ultimate consumer far outweigh possible, minor, and temporary detriment?

STATUTES INVOLVED

Section 7(a) of the Natural Gas Act[1] provides:

> Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged . . . in the distribution of natural or artificial gas to the public. . . .

Section 7(c) of the Natural Gas Act[2] provides:

> No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts. . . .

Section 7(g) of the Natural Gas Act[3] provides:

> Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

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[1] 52 Stat. 824 (1938), 15 U.S.C. § 717f(a).

[2] 52 Stat. 825 (1938), *as amended*, 56 Stat. 83 (1942), 15 U.S.C. § 717f(c).

[3] 56 Stat. 84 (1942), 15 U.S.C. § 717f(g).

STATEMENT OF THE CASE

Respondent the City of Hamilton, Ohio (Hamilton), is a municipality of approximately 80,000 inhabitants located a few miles north of the City of Cincinnati (Cincinnati). Hamilton operates its own natural gas distribution system and, for many years, has purchased its gas supply from petitioner The Cincinnati Gas & Electric Company (CG&E), which serves Cincinnati and environs. In fact, Hamilton is the only gas distributor—municipal or private—in the entire State of Ohio which has been required to purchase its supply from another distributor.

On June 16, 1965, Hamilton, anticipating the expiration of its supply contract with CG&E, filed an application with the Federal Power Commission (FPC or Commission) under Section 7(a) of the Natuarl Gas Act.[4] The application sought a Commission order directing Texas Gas Transmission Corp. (Texas Gas) to establish a connection and to sell and deliver Hamilton's future gas requirements. Hamilton's decision to file its application followed a series of investigations regarding alternate sources of supply which would become available upon the expiration of its contract with CG&E. In this regard, inquiries were made of Texas Gas, whose main transmission line crosses through Hamilton on the southeast, of Texas Eastern Transmission Corp., whose main line passes just north of Hamilton, and of Ohio Fuel Gas Company (Ohio Fuel), one of CG&E's suppliers. During the same period, Hamilton also negotiated extensively with CG&E, on the basis of whose last firm offer for continued service this case was tried before the Commission.

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[4] Quoted in pertinent part, *supra*, p. 2.

On July 15, 1965, Texas Gas sought Commission certificate authorization under Section 7(c) of the Act[5] to construct the facilities required to provide service to Hamilton. Additionally, on December 23, 1965, Ohio Fuel applied for authority to construct facilities to deliver gas directly to Hamilton, but conditioned its application upon a final Commission determination that Hamilton should not continue to be supplied by CG&E. Thus, Ohio Fuel supported continued service to Hamilton by CG&E, but purported to offer a competitive service *vis a vis* Texas Gas.

The three proposals to serve Hamilton thereby presented to the Commission were consolidated for hearing and decision (R. 2272) and were made the subject of three days of hearings in March, 1966. Subsequently, on August 8, 1966, the presiding examiner issued his initial decision (Pet. App. 30-49;[6] 37 F.P.C. 221-29; R. 2391-2404), in which he rejected CG&E's proposal for continued service and denied the competitive application filed by Ohio Fuel. In approving the Hamilton-Texas Gas project, the examiner found, *inter alia,* that the substantial benefits to Hamilton and its customers of a lower-cost gas supply from Texas Gas will not be outweighed "in the scales of the public interest" by any adverse impact upon CG&E, its suppliers, and their customers (Pet. App. 36-41, 48-49).

Thereafter, in Opinion No. 513 issued January 24, 1967 (Pet. App. 50-68; 37 F.P.C. 209-20; R. 2614-27), the Commission affirmed the examiner's initial decision and approved the Hamilton-Texas Gas project, con-

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[5] Quoted in pertinent part, *supra,* p. 2.

[6] The petition for writ of certiorari filed herein has been abbreviated "Pet.".

cluding that Hamilton and its customers will realize significant economic savings and benefits from the change of source of the Hamilton gas supply to Texas Gas (Pet. App. 54-56); that the lower commodity rates available from Texas Gas will enable Hamilton to make increased industrial sales, thereby reducing considerably its average cost of all purchased gas and, consequently, enabling it to pass on further cost savings to consumers (*Id.*, 55-56); that the economic advantages to be derived from the Hamilton-Texas Gas project are not outweighed by any economic detriment—found to be of a minor and diminishing nature—which might be sustained by CG&E, its suppliers, or their customers (*Id.*, 57-61); that the ability of CG&E and its suppliers to continue rendering service to their customers will not be affected significantly by the switch of the Hamilton load to Texas Gas (*Id.*, 54, 57-61, 65); that elimination of CG&E as an unnecessary middleman supplier for the Hamilton market will best serve the overall public interest by making available to consumers in Hamilton a direct, lower-cost supply of pipeline gas (*Id.*, 62-64); and that the diminished usefulness of the facilities presently utilized by CG&E to serve Hamilton will be short-lived and will not place any undue burden upon CG&E's remaining customers (*Id.*, 60-61). By order issued March 24, 1967 (37 F.P.C. 598-601; R. 2665-69), the Commission denied applications for rehearing and to reopen the proceedings.[7]

On review of the Commission's orders, the Sixth Circuit, in an opinion and order entered February 16, 1968

[7] Service by Texas Gas to Hamilton was in fact initiated during January, 1968, and Hamilton's rates to its customers have been lowered to effect savings amounting to some $200,000 annually.

(Pet. App. 19-29; 389 F.2d 272-77), affirmed the Commission. The court expressly concluded that the findings by the Commission were supported by substantial evidence; and that those findings had a reasonable basis, were not arbitrary, and reflected a correct application of the pertinent rules of law (Pet. App. 28). In so concluding, the court stated, *inter alia,* that Hamilton should not "be deprived of the opportunity to purchase gas at a lower rate and thereby benefit its own customers when CG&E's customers were not substantially adversely affected." (*Id.,* 26) Moreover, the court noted that the Commission's orders effectively substituted a direct gas supplier (Texas Gas) in place of an unnecessary middleman supplier (CG&E), which "is a material benefit to the ultimate consumer at retail." (*Id.,* at 27-28)

Petitioners seek review of the court's opinion and order. However, Ohio Fuel, one of the petitioners in the Sixth Circuit, does not here seek review of the action below in denying its own competitive proposal.

ARGUMENT

Certiorari Is Not Warranted

The petition does not set forth any special and important reasons which would justify the exercise by this Court of its jurisdiction on writ of certiorari.[8] At most, petitioners attempt only to invoke that jurisdiction in order to advance, once again, the same position which has been fully aired before the FPC's presiding examiner, the entire Commission, and the Sixth Circuit. The petition fails to show that the respective

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[8] See, *e.g.,* Rules 19(1)(b), 23(1)(h), and 23(4) of the Rules of this Court.

determinations below are arbitrary or unreasonable, unsupported by substantial evidence in the record[9], or in any other manner a departure from the accepted course of administrative and judicial proceedings. Moreover, no demonstration is made of a conflict between circuits or with the decisions of this Court, or of an important federal question, or, in fact, of any other matter necessitating review on certiorari.

1. *The Commission's methodology.* The primary contention by petitioners is that the Commission, in certificating the Texas Gas supply for Hamilton, accorded a "preference" to one group of natural gas consumers (*i.e.*, Hamilton's customers) at the expense of another group of consumers (*i.e.*, the remaining customers of CG&E and its suppliers). The claim, reduced to its essentials, consists of an alleged use by the Commission of inconsistent standards in evaluating the respective economic benefits and detriments to consumers which would result from authorizing the new source of supply. More specifically, petitioners point out that, in measuring the potential loss in operating revenues which would be incurred by CG&E and its suppliers by losing the Hamilton load, the Commission considered the extent to which this loss would be offset by future increases in sales by those companies to other customers; and consideration of such offsetting growth in other sales, petitioners contend, results in "camouflaging" the resulting detriment because this "doesn't

[9] In this regard, the requirement of substantial evidence is fully met if, on the whole record, it appears that the Commission *reasonably* could have made the findings and conclusions which in fact were made. *Illinois Central R.R.* v. *Norfolk & Western Ry.*, 385 U.S. 57, 69 (1966); *Universal Camera Corp* v. *NLRB*, 340 U.S. 474 (1951).

account for the actual impact of the loss" upon the existing suppliers and their customers (Pet. 9-10).

Petitioners' contention, however, ignores the basic function of the Commission's inquiry in a certificate proceeding. In certificating any proposed project the Commission is required to find, under the provisions of the Act, that the project is "required by the present or future public convenience and necessity".[10] This broad Congressional mandate, besides reposing considerable administrative discretion in the Commission, "connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination."[11] Offsetting load growth along CG&E's facilities now serving Hamilton, as well as offsetting load growth in CG&E's system generally, constitute factors which materially affect the cost of gas to the ultimate consumer, and were appropriate for consideration by the Commission.[12] Indeed, the consideration of those factors was not at all "preferential"; rather, it was fully consistent with the Commission's statutory responsibility to reflect due regard for the overall public interest — and the court below so held (Pet. App. 26-27).

Equally without merit—and in fact wholly inaccurate—is petitioners' claim that the Commission regarded offsetting growth as the controlling or sole

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[10] Natural Gas Act § 7(e), *added by* 56 Stat. 84 (1942), 15 U.S.C. § 717f(e).

[11] *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 23 (1961).

[12] Interestingly, petitioners themselves point out that the Natural Gas Act is designed "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." (Pet. 6) See *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378, 388 (1959).

determinant for public convenience and necessity in this proceeding (Pet. 6-9). In answering this same contention made in the court below, the Sixth Circuit stated, *inter alia* (Pet. App. 26):

> While we do not believe this should be the sole criterion, we think it was one of the factors which the Commission had a right to consider.

Petitioners' jaundiced view of the Commission's methodology ignores the fact that the Commission gave consideration to such other pertinent criteria as the negligible revenue loss, if any,[13] which would be suffered by CG&E and its customers even *absent* offsetting growth (Pet. App. 58-60), the economic benefits to all customers of Texas Gas, including Ohio Fuel (37 F.P.C. 600, R. 2668), the continued usefulness of existing facilities (Pet. App. 60-61), the public interest benefit derived from eliminating unnecessary middleman suppliers (*Id.*, 62-64), the economic feasibility of the Texas Gas project (*Id.*, 64), and the advantage of a gas supply subject to effective rate regulation (*Id.*, 37-38).

Moreover, petitioners' reliance on the *Shrewsbury* case[14] in support of their view is misplaced. In that case, the Commission measured the net reduction in the revenues of the existing supplier as a result of the involved market loss, evaluated the actual impact of that reduction upon the supplier's net operating income, and found this to be too small to have any significant effect upon the rates which would be charged its remaining customers. The Commission's approach in the present case is entirely consistent with that taken

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[13] At most, $12,002 annually; see discussion at pp. 12-13, *supra*.

[14] *Shrewsbury Municipal Light Dep't.* v. *New England Power Co.*, 32 F.P.C. 373 (1964), *aff'd sub nom., New England Power Co.* v. *FPC*, 349 F.2d 258 (1st Cir. 1965).

in *Shrewsbury*. In both cases the Commission focused on the actual consumer impact of the change in suppliers. Indeed, the basic inquiry was directed to the overall interest of *all* consumers—including in the present context those consumers in Hamilton, as well as those who will continue to be served by CG&E and its suppliers.

In an attempt to lend credence to their claim of "preference", petitioners contend that the action below departs from an "almost universal" FPC practice of protecting existing gas markets (Pet. 10-11). However, the two cited examples[15] of that alleged "universal" practice simply do not deal with the question whether, as a matter of regulatory policy, substitution should be allowed for existing loads. Rather, they involve substitution of suppliers seeking to serve incremental loads within market areas served by others. Moreover, a third case (which petitioners concede is part of the relevant "universe") squarely approved a substitution of gas suppliers for a complete market load in a particular area.[16]

Further, although the reason for petitioners' reference (Pet. 11) to the opinion of this Court in *El Paso*[17] is not at all clear, the attempted inference appears to be that, once consumers in an area are committed to a particular gas supply, the Commission is effectively precluded from ever certificating service by a new supplier except for incremental sales. However, the very

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[15] *Home Gas Co.* v. *FPC*, 231 F.2d 253 (D.C. Cir.), *cert. denied*, 352 U.S. 831 (1956); *Panhandle Eastern Pipeline Co.* v. *FPC*, 169 F.2d 881 (D.C. Cir.), *cert. denied*, 335 U.S. 854 (1948).

[16] *Kentucky Natural Gas Corp.* v. *FPC*, 159 F.2d 215 (6th Cir. 1947).

[17] *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

passage quoted by petitioners expressly is premised on the existence of "distribution *contracts*";[18] in the present case, there is no contract in existence, this having expired in September, 1966. Moreover, the *El Paso* case involved an antitrust action under Section 7 of the Clayton Act, rather than a public convenience and necessity case under Section 7 of the Natural Gas Act. Petitioners would twist a comment by this Court regarding the general nature of competition in the pipeline industry, as contrasted with other lines of business, into a prohibition against the very type of expansion contemplated by the Natural Gas Act. That there is no legal impediment to the substitution of one gas supplier for another in an appropriate case, as here, is made clear by Section 7(g) of the Act[19] which confers upon the Commission the power "to grant certificates of public convenience and necessity *for service of an area already being served by another natural gas company.*" (Emphasis added)

Plainly, petitioners do not show that the Commission's determination in the present case is in derogation of its responsibilities to natural gas consumers. To the contrary, the views urged in the petition are unduly restrictive of the Commission's duties and powers under the Natural Gas Act, and should be rejected out of hand.

2. *Economic impact on CG&E.* Concerning the Commission's finding that CG&E would suffer only a *de minimus* loss by the switch of suppliers, petitioners simply resort to argument that the record will support a different figure as the measure of their loss (Pet. 12-13). Those arguments were fully presented to the

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[18] *Id.*, at 660 (emphasis added).

[19] Quoted in full, *supra*, p. 2.

examiner and the Commission, and were rejected (Pet. App. 38-41, 58-61). No allegation is made that the Commission's factual findings rejecting those arguments are unsupported by substantial evidence, or that the court's finding that they were supported by substantial evidence (Pet. App. 28) was in error. Petitioners merely seek a fresh forum for *de novo* consideration of their case-in-chief, which is patently beyond the scope of certiorari.

Significantly, under the rates proposed by CG&E itself for service to Hamilton, the record shows that the rate of return to CG&E would be entirely inadequate (R. 244, 344-46). As the Commission found, CG&E would receive *gross* revenues of only $12,002 annually above its purchased gas costs, which revenues would be $148,000 short of meeting CG&E's cost of service to Hamilton, including a six per cent rate of return.[20] Thus, even if the loss to CG&E were measured by the amount of its gross revenues from the Hamilton sale, this loss would be *de minimus*. At best, it would be on the order of $120,000 over a ten-year period, rather than the $2.4 million claimed by petitioners.

The petition raises only two purported objections to the Commission's $12,002 gross revenue figure. First, petitioners contend that, due to existing contract obligations, CG&E will be required "to pay demand charges for gas which it can't use" (Pet. 12). However, to the extent that CG&E may have been bound to such contract provisions, it subsequently has been relieved

[20] Pet. App. 58-59. The arithmetic and record support underlying the Commission's figures are detailed in Supp. B to Brief of Joint Petitioners, filed in the court below.

from them by the Commission.[21] Further, petitioners' contention ignores the factual finding that any loss to CG&E through Hamilton's change in suppliers "will shortly be offset by an increase in Cincinnati Gas' other sales" (Pet. App. 60). In fact, the record shows (R. 939-40), the presiding examiner found (Pet. App. 39-40), the Commission concluded (*Id.*, 59), and the Sixth Circuit agreed (*Id.*, 25-26) that CG&E's increased sales to its other customers will be made at a better load factor than the sale to Hamilton, so that CG&E's system load factor will become higher, and its unit cost of gas lower, by losing the Hamilton load, to the actual *benefit* of CG&E's existing customers.

Petitioners' remaining objection to the $12,002 figure is that it "is based on an average of purchase gas costs" (Pet. 12). However, the court below found the Commission's use of average costs was proper (Pet. App. 24), and no reason is presented to disturb that finding. Petitioners' own evidence before the Commission does not (and, indeed, could not) trace back to CG&E's respective sources of supply the specific gas volumes which were sold to Hamilton.

3. *Effective rate protection for Hamilton.* Petitioners dispute (Pet. 13-15) the finding by the court below that "considerable doubt" exists whether a continued supply arrangement between Hamilton and CG&E would be subject to any jurisdiction by the Public Utilities Commission of Ohio (Pet. App. 24-

[21] *Atlantic Seaboard Corp.*, 38 F.P.C. 91 (1967). It is interesting to note that CG&E presently is active before the Commission in efforts to obtain additional firm sources of gas supply; see FPC Dockets CP66-205, The *Cincinnati Gas & Electric Co.*, and CP66-285, *Texas Gas Transmission Corp.*

25).[22] Not only did the court accurately appraise the present state of the law in this area, but, more importantly, even if it could be concluded that the Ohio Commission does possess jurisdiction, the fact remains that it never has exercised such jurisdiction; over the years, it merely has accepted CG&E's contract with Hamilton for filing, without making any determination of the reasonableness of the rate involved. Petitioners' inferences (Pet. 13-14) that Hamilton has sought to defer Ohio court consideration of this matter are unfounded.[23] Furthermore, the absence of any effective regulation by the Ohio Commission is illustrated by the alarming variation in the rate offerings made by CG&E to Hamilton shortly before, and during, the pendency of this case before the Commission.[24]

Strangely, on the one hand, petitioners allege there is "nothing significant" in CG&E's unwillingness to commit itself to the rates offered Hamilton beyond November 1, 1969. On the other hand, petitioners admit that any rate "as close to cost as CG&E's reduced rate to Hamilton" would require considerable care "about the future and its unknowns." (Pet. 14) Under the circumstances, Hamilton clearly is justified in its fear that CG&E's rates are not likely to be as

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[22] The CG&E-Hamilton sale is not subject to *FPC* regulation by virtue of CG&E's "Hinshaw" exemption from the provisions of the Natural Gas Act. See R. 2626; see also Natural Gas Act § 1(c), 68 Stat. 36 (1945), 15 U.S.C. § 717(c).

[23] The Ohio Supreme Court, *sua sponte*, removed the matter from its hearing calendar; subsequently, CG&E and Hamilton agreed to an indefinite postponement pending CG&E's appeal of the FPC decision involved here. The Ohio court's action was prompted by the fact that the question of Ohio Commission jurisdiction over the CG&E-Hamilton sale presently is *moot*, and will remain moot if the Sixth Circuit's decision is allowed to stand.

[24] *E.g.*, R. 84, 99, 121.

stable as those of Texas Gas, and the court below properly so found (Pet. App. 25). Even petitioners state that, if CG&E chose to "break faith" with its offered rate, Hamilton then would have available to it the remedy of "requesting FPC to authorize it a Texas Gas supply" (Pet. 14)—a virtual admission that, absent a pending Section 7(a) proceeding, Hamilton's "bargaining power" *vis a vis* CG&E is sorely limited. Manifestly, the petition does not disclose any impropriety in the Commission's having considered the benefits that would flow to Hamilton consumers through obtaining effective protection against excessive rates and charges.

4. *Loss of CG&E rate reductions.* Petitioners contend, *ipse dixit,* that, if Hamilton were retained by CG&E as a customer, "the sales units would be increased and accordingly rates could be reduced" (Pet. 15). However, the alleged loss to CG&E's customers of possible rate decreases is wholly unsupported in fact. CG&E has made no showing that any rate reductions would attend its retention of the Hamilton load; and the court below properly rejected its general allegations of such possible reductions (Pet. App. 26).[25]

Petitioners' implicit generalization that, in any case, a reduction of growth by removing existing business results in a loss of rate decreases is, when applied to the situation here, totally inapt. Rate decreases hardly can be generated by making sales at less than a fair rate of return or at a loss. As already pointed out, continuation of CG&E's sale to Hamilton would provide that company with far less than a fair rate of

[25] Likewise, CG&E presented no evidence of a possible rate increase that might attend loss of the Hamilton load, and the examiner, the Commission, and the court below found that no such increase would be required (Pet. App. 26, 40-41, 60).

return. However large and however long continued, such a sale could never result in a rate decrease either to Hamilton or to CG&E's other customers. To the contrary, CG&E's offered rate was so low in terms of CG&E's costs as to warrant concern that a rate *increase* to Hamilton would be "inevitable".[26]

5. *Unnecessary middleman supplier.* Petitioners object to the finding that CG&E is an unnecessary middleman supplier of gas to Hamilton; they state that, although CG&E "may be a middleman, it is certainly not an unnecessary middleman" (Pet. 16). But this position ignores an economic fact of life—recognized by the Commission and the court below—that CG&E, as an intermediate distributor-supplier, cannot offer rates even approaching those of Texas Gas. As a factor which materially affects the cost of gas to the ultimate consumer, CG&E's middleman status was appropriate for consideration by the Commission. Upon weighing all relevant factors, the Commission concluded that the overall public interest requires replacement of the intermediate supplier by a direct pipeline source of supply for Hamilton (Pet. App. 63-65).

6. *Economic impact on CG&E's suppliers.* Finally, petitioners complain of the finding that the Hamilton-Texas Gas project will have "no significant impact" upon CG&E's suppliers or their customers. Again, however, petitioners simply attempt to argue that the evidence supports a different measure of the loss (see pp. 11-12, *supra*); they do not demonstrate any error with respect to the finding which was made.[27]

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[26] R. 121-22, 345. CG&E's own witness agreed that its rate of return would be inadequate under its proposed rate (R. 244).

[27] Significantly, as already noted, CG&E's suppliers (which were petitioners in the court below) have not asked this Court to review the opinion and order of the Sixth Circuit.

The record compels the conclusion that petitioners' calculations of the economic impact upon CG&E's suppliers are "inflated". They properly were rejected as such by the Commission (37 F.P.C. 599; R. 2666), which rejection the court below found to have been supported by substantial evidence. The fallacy in petitioners' loss calculations is that they assume the volume of CG&E's initial cutback in gas purchases from its suppliers would remain constant in the future. However, as already discussed, the reduced volume of sales made by CG&E after losing the Hamilton load would be offset by increased sales by CG&E to its other customers. Those increased sales correspondingly will reduce CG&E's cutback on its suppliers and, thus, will reduce any potential losses. The Commission was reasonable in concluding, upon the evidence adduced, that the *actual* impact of CG&E's cutback on its suppliers would be minimal.

CONCLUSION

For these reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

J. DAVID MANN, JR.
ROBERT A. PEAVY
Attorneys for
The City of Hamilton, Ohio

Of Counsel:

MORGAN, LEWIS & BOCKIUS
Philadelphia-Washington

June 13, 1968